

ATTORNEY INSTRUCTIONS:
DIRECT APPEALS TO FIRST CIRCUIT COURT OF APPEALS- 28 U.S.C. §158(d)(2)

References: 28 U.S.C. § 158(d); Interim Fed. R. Bankr. P. 8001(f) and 8003(d).

A direct appeal from a bankruptcy court order, judgment or decree to the First Circuit Court of Appeals can come about in one of three ways:

(1) The Court on its own initiative can certify the request.

The Court must find that one of the three reasons listed in Section 158(d)(2)(A) exists:

- (a) The judgment/order involves a Question of law where there is no controlling decision from Court of Appeals or U.S. Supreme Court and it involves a matter of public importance;
- (b) The judgment/order involves a question of law requiring the resolution of conflicting decisions; or
- (c) An immediate appeal from the judgment/order may materially advance the progress of the case or proceeding.

See 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

Notice will be provided to the parties of the Court's certification and the parties will be given 10 days to file "a short supplementary statement" if they so desire. The Court of appeals may grant the request or deny the request. If denied, the appeal will proceed in the normal course.

(2) On Motion of one or more parties– but fewer than all of the Appellants and Appellees

An Appellee or Appellant can file a Petition Requesting a Direct Appeal. The Petition must contain: (a) facts necessary to understand the question presented; (b) the question itself; (c) the relief sought; (d) the reason why the direct appeal should be allowed including why one of the three circumstances specified in 28 U.S.C. § 158(d)(2)(A) exists; and (e) attach a copy of the order/judgment and any related opinion. *See* Interim Fed. R. Bankr. P. 8001(f)(3)(c). Upon filing a motion, the Clerks office will set a 10 day deadline for responses and serve a Notice of the Filing of a Request for Certification on all other parties to the appeal. After the expiration of the deadline the matter will be referred to Chambers for the certification.

(3) Certification by All Appellants and All Appellees Acting Jointly– Official Form 24

All of the parties to the appeal can decide to certify the matter to the Court of Appeals, and if all parties are on board, Official Form 24 must be completed and filed. Under CM/ECF, when using Form 24, select the event "Certification of Direct Appeal to Court of Appeals." The form "may" be accompanied with a short statement setting forth the basis for the certification which may include the items described above in Paragraph 2, a-e. Please NOTE: This Certification can only be accepted for docketing AFTER a notice of appeal or motion for leave to appeal has been filed. If the certification is filed before the appeal, it will be stricken from the docket. *See* Interim Fed. R. Bankr. P. 8001(f)(1) The Court will then transmit the Certification to the Court of Appeals.

NOTES:

(1) **Timing & Filing**– (a) Under any of the three scenarios, a Certification can only be filed and docketed in the Bankruptcy Court until the appeal is “docketed” in accordance with Fed. R. Bankr. P. 8007 (i.e. when the record on appeal is completed and transmitted to the clerk of the BAP or District Court), or if the order is interlocutory, until the motion for leave to appeal is granted. If the certification (and request for certification) is filed after that time, it will be referred to the BAP or the District Court. (b) A certification made by the bankruptcy court *sua sponte* or upon the request of a party must be done within 60 days of the entry of the judgement order or decree being appealed from. *See* 28 U.S.C. § 158(d)(2)(E)

(2) **Pending Motions for Leave to Appeal**: If a Certification is made while a motion for leave to appeal is still pending, the authorization by the Court of Appeals allowing the direct appeal effectively grants the motion for leave to appeal. *See* Interim Fed. R. Bankr. P. 8003(d).